Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States

DR. GEORGE PIECZENIK

Petitioner,

v.

NEW JERSEY ALTERNATE BENEFIT PROGRAM
DIVISION OF PENSION AND BENEFITS
STATE OF NEW JERSEY

Respondent.

On Petition For Writ of Certiorari To The Supreme Court of New Jersey and to the District Court for the Southern District of New York

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1) Whether Dr. Pieczenik, *pro se*, was denied his Fourteenth Amendment right to Due Process when the District Court for the Southern District of New York referred his case to the New Jersey Judicial system and ultimately to the Supreme Court of New Jersey which ignored the SDNY and this Supreme Court's jurisdiction and the *stare decisis* decision in Rousey v Jacoway, 544 USC 320 (2005), on pension "trigger dates"?

2) Should this Court grant certiorari to resolve the two-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) "in-service" pension withdrawal are triggered by age as ruled in Rousey v. Jacoway, 544 USC 320 (2005)?

3) Does the District Court for the Southern District still have jurisdiction over this case after this Supreme Court denies hearing this brief? Is Court Supremacy invalid in this case?

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Authorities and Citations

Rousey V. Jacoway (03-1407) 544 US 320 (2005)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

I, Dr. George Pieczenik, *pro se*, respectfully request that the Honorable Justices of the Supreme Court grant a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey rendered on March 14, 2005 and allow the District Court for the Southern District of New York to resume its jurisdiction over the parties in this case under this Court's *stare decisis* re: *Rousey v Jacoway*.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (Appendix I) is the subject of this Petition is *Pieczenik v Alternate Benefit Plan, Department of Pensions and Benefits, State of New Jersey, C-686, September Term 2005, 59, 081* ruling on Appellate Order (Appendix III) and the Final Determination of Director of Pensions (Appendix IV) and, separately, the order of Judge Eaton of the Southern District of New York (Appendix II).

STATEMENT OF THE BASIS FOR JURISDICTION

I, Dr. George Pieczenik, *pro se*, believe I may petition the Court under Title 28 of the United States Code § 1254 and §1257(a) 2002 to review the ruling of the Supreme Court of New Jersey and Judge Eaton's order.

Background: The Southern District of New York deferred to the New Jersey Judicial System for a ruling on "in-service" pension withdrawal requested by a New York Resident with the intent of having the case returned to its Jurisdiction. Judge Eaton, Magistrate Judge for the Southern District of New York, acted judiciously in requesting that the Division of Pensions and Benefits and the NJ Court system give a final determination on pro se Petitioner's request for 'in-service' withdrawal of his pension funds, Appendix B. However, in so doing Judge Eaton inadvertently placed Petitioner Pieczenik in a situation where this present Supreme Court's ruling on this case will not be the final determination of this case. Nor, will the denial of certiorari be the final ruling in this case. In effect, because of the parallel nature and multiple jurisdictions involved in this case, this Supreme Court will not have the last word and it will lose its legal Supremacy to Judge Eaton's Court. In addition, this case can then proceed from Judge Eaton's Court, in a parallel track and come back to this Court through the Southern District of New York Court and then the First Circuit Court of Appeals. In effect, Judge Eaton has placed this Court in a secondary position to both the Southern District and the NJ Judicial State Court system. This is a clear violation of this Court's Judicial Supremacy.

How can this violation of this Court's Judicial Supremacy be addressed?

The solution is very simple. This Court can accept this Brief and then return this case by Certiorari to Judge Eaton's Court under the color of *Rousey v. Jakoway*. This solves the issue of the NJ Supreme Court having failed to read and address this Court's very recent ruling in *Rousey v. Jakoway*. This Court's ruling reads directly on this issue of "age" being the trigger for receiving pension benefits as determined by Federal law. In *Rousey v Jakoway*, this Court upheld that "IRAs fulfill both the §522(d)(10)(E) requirements …-they confer a right to receive **payment on account of age** and they are similar plans or contracts to those enumerated in §522(d)(10)(E)".

Initially, Judge Eaton had a clear ruling from the Supreme Court on this issue. Judge Eaton could have used *Roussey v. Jakoway* as *stare decisis* and ruled in Petitioner's favor and not subject him to the vagaries of the New Jersey Court system. At present, New Jersey's State medical school system (UMDNJ) is now under Federal Judge Stern's control for failing for 15 years to account for a missing $700 million dollars. Ergo, Federal Judges have already received Court authority to run New Jersey State agencies, such as, the Division of Pension and Benefits.

Judge Eaton could have exerted his jurisdiction and ruled in line with the recent *stare decisis* decision of this Supreme Court of the United States when it ruled:

"Thus, Jacoway maintains that there is no causal connection between the Rouseys' right to payment and age (or any other factor), because their IRAs provide a right to payment on demand.

We disagree. **The statutes governing IRAs persuade us that the Rouseys' right to payment from IRAs is causally connected to their age.** Their **right to receive payment of the entire balance is not in dispute**. Because their accounts qualify as IRAs under 26 U. S. C. §408(a) (2000 ed. and Supp. II), the Rouseys have a nonforfeitable right tothe balance held in those accounts, §408(a)(4). That right is restricted by a 10 percent tax penalty that applies to withdrawals from IRAs made before the accountholder turns 591/2. ....

Thus, that there are other circumstances in which the Rouseys can receive payment does not change our conclusion **that they have a right to payment on account of age**, for these exceptions do not undermine the fact that they cannot obtain unrestricted use of their funds until age 59½. Moreover, §522(d)(10)(E) requires that the right to payment be on account of age—not that it be solely on account of this factor...

Accordingly, we conclude that the Rouseys' IRAs provide a right to payment on account of age."

This ruling was a unanimous Supreme Court ruling. It gave Judge Eaton both the right and the jurisdiction to rule in Petitioner Pieczenik's cause and that he be allowed to withdraw his pension funds *in toto* after the age of 59 ½ without any other conditions such as "termination of

participation in the Alternate Benefit Program" pension plan or "termination of service". "Age" being the operative word in *Rousey v Jakoway.*

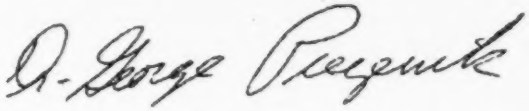
Judge Eaton, instead allowed the Division of Pension and Benefits to rule on this issue as a final administrative matter and, thereby, through the whole NJ Court system. The NJ Court rulings simply rubber stamped the Divisions determination without comment, rational, memorandum of law or conceptual input. The Appellate Court wrote.."we affirm..for the reasons set forth in the Director's final determination" and the NJ Supreme Court wrote "the petition of certification is denied." Neither ruling being profound or studied as required by law, courtesy to the public and the legitimization of their authority.

However, we believe that this "pension in-service withdrawal age issue" is not the issue for this Court to decide at this juncture. This Court must resolve the jurisdictional ambiguity of the two circuit conflict and address the issue of Judicial Supremacy. This Court can grant certiorari to return this case back to Judge Eaton's court and the jurisdiction of the District Court for the Southern District, under the color of *Roussey v Jacoway.* Without this certiorari, this case shall re-appear, through a parallel jurisdiction, but having unnecessarily endangered the Constitutional bedrock principle of the Supreme Court's Judicial Supremacy.

CONCLUSION AND PRAYER

I move, in this petition, that the Supreme Court of the United States properly address the issue of sending this case back to Judge Eaton of the Southern District of New York to adjudicate it along age-related guidelines as enunciated in this Court's recent ruling in *Rousey v Jakaway*. I pray this Court instruct Judge Eaton to allow Petitioner's pension money be returned to Petitioner *in toto* as a consequence of his having reached the age of 59 ½ and allow his continued service as a Professor.

I further declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.
Signed this day of the 11th of June, 2006 at New York N.Y.



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APPENDIX I

SUPREME COURT OF NEW JERSEY
C-686 September Term 2005
59, 081

IN THE MATTER OF
NEW JERSEY ALTERNATE
BENEFIT PROGRAM ON PETITION
FOR CERTIFICATION

(GEORGE PIECZENIK- Petitioner)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5500-04 having been submitted to this Court, and the Court having consider the same;

It is ORDERED that the petition of certification is denied.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 14th day of March, 2006.

/Stephen ?/
CLERK OF THE SUPREME COURT

APPENDIX II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Dr. George Pieczenik, Plaintiff, Pro Se (05-CIV-2193)(LTS)(DFE)

- - against –

TIAA-Cref, Mr.Beaver, Henry McKinnell
1 to 5 JANE DOES, 1 to 31 JOHN DOES
Defendants

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED that the above-captioned action is stayed and that there shall be no further proceedings in this action, including any pleadings, motions, discovery, hearing, conferences and communications from Dr. Pieczenik to defendants and/or their counsel regarding this action, until the full and final adjudication or complete settlement of both of the following actions involving Dr. Pieczenik:

(1) Pieczenik v. Pfizer, Inc., 04CV4558(LAK)(RLE); and
(2) Dr. Pieczenik's appeals from the Final Administrative Determination of Fredrick J. Beaver, Director, State of New Jersey Department of the Treasury Division of Pensions and Benefits, dated May 9, 2005.

This Stipulation and Order is without prejudice to any defendant's right to assert any claim or defense in this action at a later date.

Dated: June 16, 2005
New York, New York

GEORGE PIECZENIK

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Attorneys for Defendant Frederick J. Beaver

SO ORDERED

Dated: /June 20, 2005/

/Douglas F. Eaton/
The Honorable Douglas F.Eaton

APPENDIX III

FINAL ADMINISTRATIVE DETERMINATION

Dear Professor Pieczenik:

I am writing in reference to you (sic, request for an appeal of the administrative determination issued by Joseph Zisa on February 16, 2005, denying your request to withdraw mandatory employer and employee contributions, plus any gain resulting from investment performance, from your retirement account under the New Jersey Alternate Benefit Program (ABP). I have reviewed your written submission and the documentation accompanying your request for appeal. I made the following finding of fact:

A review of the relevant documents in this matter indicates that you are currently an active full-time professor at Rutgers, The State University, and a member of the ABP as of March 31, 2005, with no indication of change in your employment status.

N.J.S.A 18A:66-170 provides:
All full-time officers and all full-time members of the faculty of the University of Medicine and Dentistry of New Jersey, Rutgers, The State University, the Newark College of Engineering,the State and county colleges and all regularly appointed teaching and administrative staff members in applicable positions, as determined by the Director of the Division or Pensions in the Department of the Treasury, shall be eligible and shall participate in the alternate benefit probram, except thos person appointed in a part-time or temporary capacity, physicians and dentists holding employment in positions titled intern, resident or fellow on or after the effective date of this amendatory act, persons compensated on a fee basis, persons temporarily in the

United States under an F or J visa and members of the Teachers' Pension and Annuity Fund, the Public Employees' Retirment System, the Police and Firemen's Retirment System or the Group Annuity Plan, who did not elect to transfer to the alternte benefit probram in accordance with the provisions of chapter 64C or 65 of Title 18A of the New Jersey Statutes P.L1967 c.276(C.18A:66-130 et seq. or c. 281(C. 18A:66-142 et seq.). or P.L.1968, c. 181(C.18A:66-154 et seq.). An eligible person who has been enrolled in the alternate benefit program for at least one year pursuant to this section may continue to be enrolled in the program, notwithstanding promotion or transfer to a position within the institution not otherwise eligible for the program.

N.J.S.A. 18A:66-170 also provides:
Any person receiving a benefit by reason of his retirement from any retirement or pension system of the State of New Jersey or any political subdivision thereof shall be ineligible to participate in the alternate benefit program.

N.J.S.A. 18A:66-170 further states:
The alternate benefit programs established pursuant to this act are deemed to be pension funds or retirement systems for purposes of P.L.1968 c 23(C 43:3C-1 et seq.)

N.J.S.A. 18A:66-175 provides:
Membership or participation in the alternate benefit program shall terminate and the individual shall be considered retired once he has elected to receive a cash distribution upon separation from service or an annuity option from the designated insurer or insurers or a designated mutual fund company or companies, as appropriate.

N.J.S.A. 18A:66-190 provides:
The Board of Trustees of the New Jersey College of

Medicine and Dentistry, the Board of Governors of Rutgers, The State University, the Board of Trustees of the New Jersey Institute of Technology and the boards of trustees of State and county colleges, are hereby authorized to enter into agreement with each employee participating in the alternate benefit program whereby the employee agrees to take a reduction in salary with respect to amounts earned after the effective date of such agreement in return for the agreement of the respective institution to use a corresponding amount to purchase an annuity for such employee so as to obtain the benefits afforded under section 403(b) of the Federal Internal Revenue Code, as amended. (26 USCA § 403(b)). Any such agreement shall specify the amount of funds reduction, the effective date thereof, and shall be legally binding and irrevocable with respect to amounts earned while the agreement may be terminated after it has been in effect for a period of not less than one year upon notice in writing by either party, and provided further that not more than one such agreement shall be entered into during any taxable year of the employee. For the purposes of this section, any annuity or other contract which meets the requirements of section 403(b) of the Federal Internal Revenue Code, as amended, may be utilized. The amount of the reduction in salary under any agreement entered into between the institutions any employee pursuant to this section shall not exceed the limitations set forth in P.I.93-406(Employment Retirement Income Security Act of 1974)(29 USCA§1001 et seq.) and Section 415(c) of the Internal Revenue Code of 1954 as amended (26USCA§415(c)) for such a year.

Internal Revenue Code 403(b)(11) provides:
Requirement that distributions not begin before age 59 ½, severance from employment, death, or disability.

This subsection shall not apply to any annuity contract unless under such contract distributions attributable to contributions

made pursuant to a salary reduction agreement (within the meaning of section 402(g)(3)(C)) may be paid only-

(A) when the employee attains age 59 1/2 , has a severance from employment, dies, or becomes disabled (within the meaning of section 72(m)(7), or
(B) in the case of hardhip.

Such contract may not provide for the distribution of any income attributable to such contributions in the case of hardship.

You have indicated that you believe the ABP should permit in-service distributions in the form of a lump sum or an annuity to its members because:

1. in-service distributions are permitted under Internal Revenue Code Section 403(b)(11).
2. the statutory guidance for the ABP (N.J.S.A. 18A:66-158 et seq) does no specifically speak to the ability of a member to receive in-service distributions.
3. the legislative intent of the N.J.S.A. 18A:66-175 was to not require separtation from service before receiving an annuity from the ABP, and
4. in-service distributions are permitted by other similar retirement programs.

I will address each of these assertions in order.

Item #1- in –service distributions are permitted under Internal Revenue Code Section 403(b)(11)

The Division does not dispute that such distributions are permitted under the federal tax code. However, it is the Divisions contentions that IRC 403(v)(11) merely permits a plan to offer individuals attaining the age of 59 ½ the ability to receive a plan distribution and not require it. To paraphrase the citation "(the) subsection shall not aply to any annuity contract unless under such contract distributions…may be paid only….when the employee attains age 59 ½…" So,

while permitted, it is still contingent upon the plan to offer such a distribution option.

Item #2-statutory guidance for the ABP (N.J.S.A. 18A:66.168 et seq. does not specifically speak to the ability of a member to receive in-service distributions.

When viewed as a whole, the Division believes N.J.S.A. 18A:168-168 et seq. does not permit in-service distributions. N.J.S.A. 18A:66-170 states in part that "all...full-time members of the faculty of ...Rutgers, the State University..shall be eligible and shall participate in the alternate benefit program...Exceptions to this requirement to participate in the ABP are mentioned in N.J.S. A. 18A: 66-170 but you do not appear to meet anyh of the conditions for exlusion nor have you made a claim to be excluded from ABP participation. Therefore, participation in the ABP is a condition of your employment with Rutgers.

N.J.S.A. 18A:66-175 states that "...participation in the alternate benefit program shall terminate and the individual shall be considered retired once he has elected to receive a cash distribution upon separation from service or an annuity option from the designated insurer or insurers or a designated mutual fund company or companies, as appropriate."

If you were to receive a distribution from the ABP, either as a lump sum or as an annity, your participation in the ABP would be terminated and you would be considered retired.

N.J.S.A. 18A:66-170 also states that "(t)he alternate benefit programs...are deemed to be pension funds or retirement systems.." And that "(a)ny person receiving a benefit by reason of his retirement from any retirement or pension system...shall be ineligible to Participate in the alternate benefit program."

Item #3- legislative intent of N.J.S.A. 18 A:66-175 was to not require separation from service before receiving an annuity from ABP.

Again, as stated in my response to item #2, when viewed as a whole, the Division believes N.J.S.A. 18A:66-168 et seq. does not permit in-service distributions. The legislation requires pension membership as a condition of employment and a distribution from the ABP would terminate such a retirement plan participation.

Item #4- in-service distributions are permitted by other similar retirement programs

This assertion serves to reinforce the Division's position in the response to item #1, that it is a permitted distribution but not required. The availability of this option under other retirement programs can not be extended to the State's program. Each program is operated in accordance with its own plan rules. As stated earlier, the Division believes that the prevailing statutes do not permit in-service distributions.

Therefore, your request to receive an in service distribution of your mandatory employer and employee contributions, plus and gain resulting from investment performance, from your retirement account under the ABP has been denied.

As noted above, I have reviewed your written submissions including your written request of appeal. Because this matter doesn't not entail any disputed questions of fact, I was able to reach my findings of fact and conclusions of law in this matter on the basis of the retirement system's enabling statutes and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of this office.

You have the right, if you wish, to appeal this final administrative action to the superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey. Sincerely, /Frederick J. Beaver/

Frederick Beaver, Director

APPENDIX IV

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5500-04T2

IN THE MATTER OF NEW JERSEY
ALTERNATE BENEFIT PROGRAM

Submitted December 20, 2005- Decided January 11, 2006
Before Judges Skillman and Axelrad.

On Appeal from Division of Pension and Benefits,

Dr. George Pieczenik, appellant, pro se.

Peter C. Harvey, Attorney General, attorney for respondent (Michael J. Haas, Assistant Attorney General, of counsel; David Dembe, Deputy Attorney General, on the brief).

PER CURIAM

Appellant George Pieczenik appeals from a final decision of the Director of the Division of Pension and

Benefits, Dated May 9, 2005, which denied his request to receive an in-service distribution of mandatory employer and employee contributions, plus any gains resulting from the investment performance, from his retirement account under the Alternate Benefit Program.

We affirm substantially for the reasons set forth in the Director's final decision.

Affirmed... /Jeffrey?/
Acting Clerk of the Appellate Division